

AMENDED IN ASSEMBLY SEPTEMBER 2, 2011

AMENDED IN ASSEMBLY AUGUST 15, 2011

AMENDED IN ASSEMBLY JULY 12, 2011

AMENDED IN SENATE MAY 27, 2011

AMENDED IN SENATE MARCH 23, 2011

SENATE BILL

No. 459

Introduced by Senator Corbett

February 16, 2011

An act to add Sections 226.8 and 2753 to the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 459, as amended, Corbett. Employment: independent contractors.

Existing law prescribes comprehensive requirements relating to minimum wages, overtime compensation, and standards for working conditions for the protection of employees applicable to an employment relationship.

This bill would prohibit willful misclassification, as defined, of individuals as independent contractors. *The bill also would prohibit charging individuals who have been mischaracterized as independent contractors a fee or making deductions from compensation, as specified, where those acts would have violated the law if the individuals had not been mischaracterized.* The bill would authorize the Labor and Workforce Development Agency to assess specified civil penalties from damages against, and would require the agency to take other specified disciplinary actions against, persons or employers violating the bill these prohibitions. It would also require the agency to notify the

Contractors' State License Board of a violator that is a licensed contractor, and require the board to initiate an action against the licensee. *The bill would authorize an individual to file a complaint, as specified, to request the Labor Commissioner to issue a determination that a person or employer has violated these prohibitions with regard to the individual filing the complaint. The bill would authorize the Labor Commissioner to assess civil and liquidated damages against a person or employer based on a determination that the person or employer has violated these prohibitions.*

This bill would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt from the provisions regarding joint and several liability a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.8 is added to the Labor Code, to
2 read:
3 226.8. (a) It is unlawful for any person or employer to engage
4 in any of the following activities:
5 (1) Willful misclassification of an individual as an independent
6 contractor.
7 (2) Charging an individual who has been willfully misclassified
8 as an independent contractor a fee, or making any deductions from
9 compensation, for any purpose, including for goods, materials,
10 space rental, services, government licenses, repairs, equipment
11 maintenance, or fines arising from the individual's employment
12 ~~where the employer would have been in violation of any of the~~
13 ~~acts described in this paragraph would have violated the law if~~
14 ~~the individual had not been misclassified.~~
15 (b) If the Labor and Workforce Development Agency, ~~or any~~
16 ~~of its departments, divisions, commissions, boards, or agencies,~~
17 ~~or a court finds~~ *issues a determination* that a person or employer
18 has engaged in any of the enumerated violations of subdivision

1 (a), *the person or employer shall be subject to a civil penalty of*
2 *not less than five thousand dollars (\$5,000) and not more than*
3 *fifteen thousand dollars (\$15,000) ~~shall be assessed against the~~*
4 *person or employer for each violation, in addition to any other*
5 *penalties or fines permitted by law.*

6 (c) If the Labor and Workforce Development Agency, ~~or any~~
7 ~~of its departments, divisions, commissions, boards, or agencies,~~
8 *or a court finds issues a determination that a person or employer*
9 *has engaged in any of the enumerated violations of subdivision*
10 *(a) and the person or employer has engaged in or is engaging in a*
11 *pattern or practice of these ~~behaviors, violations, the person or~~*
12 *employer shall be subject to a civil penalty of not less than ten*
13 *thousand dollars (\$10,000) and not more than twenty-five thousand*
14 *dollars (\$25,000) ~~shall be assessed against the person or employer~~*
15 *for each violation, in addition to any other penalties or fines*
16 *permitted by law.*

17 (d) (1) If the Labor and Workforce Development Agency, ~~or~~
18 ~~any of its departments, divisions, commissions, boards, or agencies,~~
19 *or a court finds issues a determination that a person or employer*
20 *that is a licensed contractor pursuant to the Contractors' State*
21 *License Law has violated subdivision (a), the agency, in addition*
22 *to any other remedy that has been ordered, shall transmit a certified*
23 *copy of the ~~finding order~~ to the Contractors' State License Board.*

24 (2) The registrar of the Contractors' State License Board shall
25 initiate disciplinary action against a licensee within 30 days of
26 receiving a certified copy of an agency or court ~~finding order that~~
27 *resulted in disbarment pursuant to paragraph (1).*

28 (e) If the Labor and Workforce Development Agency, ~~or any~~
29 ~~of its departments, divisions, commissions, boards, or agencies,~~
30 ~~or~~ *or a court finds issues a determination that a person or employer*
31 *has violated subdivision (a), the agency or court, in addition to*
32 *any other remedy that has been ordered, shall order the person or*
33 *employer to display prominently on its Internet Web site, in an*
34 *area which is accessible to all employees and the general public,*
35 *or, if the person or employer does not have an Internet Web site,*
36 *to display prominently in an area that is accessible to all employees*
37 *and the general public at each location where a violation of*
38 *subdivision (a) occurred, a notice that sets forth all of the*
39 *following:*

1 (1) That the Labor and Workforce Development Agency or a
2 court, as applicable, has found that the person or employer has
3 committed a serious violation of the law by engaging in the willful
4 misclassification of employees.

5 (2) That the person or employer has changed its business
6 practices in order to avoid committing further violations of this
7 section.

8 (3) That any employee who believes that he or she is being
9 misclassified as an independent contractor may contact the ~~Division~~
10 ~~of Labor Standards Enforcement, the Employment Development~~
11 ~~Department, or the Franchise Tax Board~~ *Labor and Workforce*
12 *Development Agency*. The notice shall include the mailing address,
13 e-mail address, and telephone number of ~~each~~ *the* agency.

14 (4) That the notice is being posted pursuant to a state order.

15 (f) In addition to including the information specified in
16 subdivision (e), a person or employer also shall satisfy the
17 following requirements in preparing the notice:

18 ~~(1) The chief executive officer, president, or other highest~~
19 ~~ranking officer shall sign the notice.~~

20 *(1) An officer shall sign the notice.*

21 (2) It shall post the notice for ~~two years~~ *one year* commencing
22 with the date of the final decision and order.

23 ~~(3) If the person or employer does not have an Internet Web~~
24 ~~site, it shall post a copy of the order at each place where its~~
25 ~~employees report for work within the state, and that order shall be~~
26 ~~prominently displayed in an area which is accessible to all~~
27 ~~employees and the general public.~~

28 *(g) (1) In accordance with the procedures specified in Sections*
29 *98 to 98.2, inclusive, the Labor Commissioner may issue a*
30 *determination that a person or employer has violated subdivision*
31 *(a).*

32 *(2) If, upon inspection or investigation, the Labor Commissioner*
33 *determines that a person or employer has violated subdivision (a),*
34 *the Labor Commissioner may issue a citation to assess damages*
35 *set forth in subdivisions (b) and (c) in addition to any other*
36 *penalties or damages that are otherwise available at law. The*
37 *procedures for issuing, contesting, and enforcing judgments shall*
38 *be the same as those set forth in Section 1197.1.*

39 *(3) The Labor Commissioner may enforce this section pursuant*
40 *to Section 98 or in a civil suit.*

~~(g)~~

(h) Any administrative or civil penalty pursuant to subdivision (b) or (c) or disciplinary action pursuant to subdivision (d) or (e) shall remain in effect against any successor corporation, owner, or business entity that satisfies both of the following:

(1) Has one or more of the same principals or officers as the person or employer subject to the penalty or action.

(2) Is engaged in the same or ~~equivalent trade or activity~~ a similar business as the person or employer subject to the penalty or action.

~~(h) For purposes of this section, “willful” means voluntarily and knowingly to avoid employee status for that individual.~~

(i) For purposes of this section, the following definitions apply:

(1) “Determination” means an order, decision, award, or citation issued by an agency or a court of competent jurisdiction for which the time to appeal has expired and for which no appeal is pending.

(2) “Labor and Workforce Development Agency” means the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, or agencies.

(3) “Officer” means the chief executive officer, president, any vice president in charge of a principal business unit, division, or function, or any other officer of the corporation who performs a policymaking function. If the employer is a partnership, “officer” means a partner. If the employer is a sole proprietor, “officer” means the owner.

(4) “Willful misclassification” means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.

~~(i)~~

(j) Nothing in this section is intended to limit any rights or remedies otherwise available at law.

SEC. 2. Section 2753 is added to the Labor Code, to read:

2753. (a) A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor.

(b) This section does not apply to the following persons:

(1) A person who provides advice to his or her employer.

- 1 (2) An attorney authorized to practice law in California or
- 2 another United States jurisdiction who provides legal advice in
- 3 the course of the practice of law.

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